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LAWFLASH

SEC AND CFTC PROPOSE AMENDMENTS TO FORM PF TO REDUCE REPORTING BURDENS

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AUTHORS

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On April 20, 2026, the US Securities and Exchange Commission (SEC) and US Commodity Futures Trading Commission (CFTC and, together with the SEC, the Commissions) jointly proposed amendments to Form PF (Proposed Amendments) designed to reduce private fund reporting burdens. The proposal includes modifications to certain of the requirements adopted in a February 2024 final rule expanding Form PF reporting requirements that is scheduled to go into effect on October 1, 2026. Comments on the proposal are due by June 23, 2026.

The Proposed Amendments [1] would affect certain investment advisers registered with the SEC (RIAs) and that advise private funds, [2] including those that also are registered with the CFTC as commodity pool operators (CPOs) or commodity trading advisors (CTAs).

Following four sets of prior amendments to Form PF since its initial adoption in 2011, the Commissions noted that the Proposed Amendments represent a full-scale review of Form PF for which they consulted with the Financial Stability Oversight Council (FSOC) to ensure that the revisions would meet the goal of providing FSOC with the information necessary to assess systemic risk while not requiring overly burdensome and low-utility regulatory reporting.

BACKGROUND

The Commissions adopted Form PF (Reporting Form for Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors) in 2011 in response to the mandate within the Dodd-Frank Act that the SEC and CFTC, in consultation with FSOC, jointly issue rules to establish a system of private fund reporting. Since then, the Commissions have adopted a series of amendments altering the scope of the reporting requirements.

Following the initial set of amendments in 2014 targeted at money market funds, [3] the SEC adopted amendments to Form PF in May 2023 that required

- current reporting by large hedge fund advisers on certain events that could indicate significant stress at a fund or investor harm as soon as practicable but no later than 72 hours after the event;
- quarterly event reporting by all private equity fund advisers for certain triggering events; and
- reporting on general partner and limited partner clawbacks as well as information regarding strategies and borrowings for large private equity fund advisers. [4]

In July 2023, the SEC adopted additional amendments to Form PF that apply only to large liquidity fund advisers with the intent to align such advisers' reporting requirements with those of money market funds. [5]

In February 2024, the Commissions adopted further amendments to Form PF (the 2024 Amendments). Broadly, the 2024 Amendments would have required managers to look through certain types of fund structures and report information about them on a disaggregated basis (e.g., advisers would have had to report information about master-feeder funds, parallel funds, trading vehicles, and relationships with relevant parties) and would have mandated reporting of additional information including private funds' and hedge funds' operations, trading vehicles, and investments in other funds. [6]

However, the compliance date for the 2024 Amendments has been delayed several times, most recently until October 1, 2026. As such, advisers have been permitted to file the version of Form PF that was in place prior to the adoption of the 2024 Amendments. [7] Certain of the Proposed Amendments would eliminate or streamline aspects of the 2023 and 2024 amendments.

SUMMARY OF THE PROPOSED AMENDMENTS

Eliminating Filing Requirements for Advisers with Less than $1 Billion in Private Fund Assets

The Proposed Amendments would raise the filing threshold from $150 million in private fund assets under management (AUM) to $1 billion. The SEC estimates that this would reduce the number of advisers required to file by about 50%, while continuing to obtain information on over 90% of private fund gross asset value that advisers report. Additionally, the proposal would require that SEC staff assess whether this threshold should be adjusted for inflation approximately every five years.

Raising the Large Hedge Fund Adviser Threshold to $10 Billion

The Proposed Amendments would raise the threshold for a "large hedge fund adviser" from $1.5 billion in hedge fund AUM to $10 billion. The SEC estimates that this would eliminate certain reporting obligations for almost two-thirds of advisers that currently must report as large hedge fund advisers, while continuing to obtain information quarterly on over 80% of hedge fund gross asset value that advisers report.

Notably, raising this threshold would eliminate the current reporting requirements for a significant percentage of filers. The five-year reassessment schedule noted above would apply to this threshold as well.

Eliminating, Streamlining, and Simplifying Certain Other Reporting Requirements

The Proposed Amendments would eliminate or revise certain questions within Sections 1, 2, 5, and 6 of Form PF as well as enact general corrections. Specifically, the proposal would:

Section 1: Requirements for All Form PF Filers

- Eliminate separate reporting for certain feeder funds that have de minimis holdings outside a single master fund, US treasury bills, and/or cash and cash equivalents.
- Eliminate "look through" requirements, allowing filers to report indirect exposures based on reasonable estimates.
- Narrow the universe of trading vehicles that advisers must identify. (Question 9.)
- Eliminate certain performance volatility reporting requirements and certain trading and clearing reporting requirements. (Questions 23(c), 29, and 30.)

Section 2: Large Hedge Fund Reporting Requirements

- Streamline monthly adjusted exposure reporting by eliminating the requirement to report additional adjusted exposure based on the adviser's internal methodologies. (Question 32.)
- Eliminate the portfolio turnover reporting question. (Question 34.)
- Permit filers to report fewer digits of the applicable NAICS codes when identifying industries when reporting monthly industry exposures. (Question 36.)
- Eliminate certain reporting concerning qualifying hedge funds' monthly exposures to specific position-level reference assets and instead include streamlined exposure reporting under an existing extraordinary loss current report trigger. (Questions 39 and 40 and Section 5, Item B.)
- Simplify questions regarding certain large hedge fund counterparty exposure reporting. (Questions 41 and 42, and conforming amendments to Questions 18, 26, 43, and the Glossary of Terms.)
- Eliminate the rehypothecation reporting question. (Question 45.)

Section 5: Current Report Requirements for Large Hedge Fund Advisers to Qualifying Hedge Funds

- Eliminate the "as soon as practicable" language in the current report requirements to simply require filing within 72 hours of a qualifying event. This change would avoid the current industry confusion as to whether advisers have an obligation to file such reports in less than 72 hours. (Section 5.)
- Eliminate the current report trigger if a qualifying hedge fund is in margin default or is unable to meet a call for margin, collateral, or equivalents. (Section 5, Item D.)
- Amend the "Operations Event" current report trigger standard. An "Operations Event" is one that represents a significant disruption or degradation of a fund's "critical operations." "Critical operations" are currently defined in Form PF as " operations necessary for (1) the investment, trading, valuation, reporting, and risk management of the reporting fund; or (2) the operation of the reporting fund in accordance with the Federal securities laws and regulations." The current proposal would remove the second prong of this definition. The SEC noted that the rationale for this change is to reduce confusion as to when reporting is required. (Section 5, Item G and the Glossary of Terms.)
- Eliminate the current report requirement for failure to meet redemption requests. (Section 5, Item I.)

Section 6: Quarterly Reporting Requirements for Advisers to Private Equity Funds

- Eliminate **all** quarterly event reporting requirements for private equity fund advisers, including reporting that is currently required for adviser-led secondary transactions.

Private Credit – Open for Input

In addition to the proposed changes outlined above, the Commissions have requested comment on whether to modify the information that advisers must report about private credit funds, indicating active regulatory interest

in the area.

Hedge Fund Definition

Notably, the Commissions chose not to revisit the definition of "hedge fund" for Form PF reporting purposes. The current definition is quite broad and includes private funds that have the ability to be paid a performance fee or allocation that takes into account unrealized gains, incur leverage or gross notional exposure in certain amounts, or engage in short selling. As such, the current definition often captures private equity funds or other funds that have permissive language included in the fund's governing documents but are not in fact hedge funds. While the Commissions did not propose amending this definition, this is a topic that may be addressed in the comment process.

Transition Period and Expected Timing in Conjunction with the 2024 Amendments

The Commissions have proposed a minimum 12-month transition period from the date of publication in the *Federal Register* if the Proposed Amendments are adopted. The Commissions also noted that they are mindful of the October 1, 2026 compliance date for the 2024 Amendments and will consider how the timing of any new amendments will relate to such compliance date. [8]

IMPACT OF THE PROPOSED AMENDMENTS

As a whole, the Proposed Amendments are designed to reduce advisers' disclosure obligations while retaining the Commissions' ability to collect key data in accordance with their obligation to collect systemic risk information for evaluation by FSOC. The Commissions indicated that, notwithstanding the reduced reporting burdens, the amended Form PF would still capture a significant majority of private fund information and exposures and enable the agencies to monitor systemic risk.

In the press release associated with the proposal, SEC Chairman Paul S. Atkins stated that a key pillar of his agenda is "restoring balance to disclosure obligations and reducing the cost of compliance wherever possible." He also noted that these amendments are designed to rationalize the scope of Form PF reporting and avoid "overly burdensome disclosure requirements" without a commensurate regulatory benefit.

CFTC Chairman Michael S. Selig also expressed his satisfaction with the Commissions' commitment to taking steps to reducing burdens on filers in the associated press release. SEC Commissioners Hester M. Peirce and Mark T. Uyeda both submitted statements expressing their support for the Proposed Amendments, with Peirce's statement welcoming feedback both generally and on certain specific points, including whether questions 42 and 43 of Form PF, which cover counterparty exposure, should be eliminated rather than slimmed down. [9]

These amendments are expected to provide welcome relief to industry participants and significantly reduce compliance burdens for many advisers. While some industry participants have expressed that they are generally pleased by the proposed amendments, some are calling for further streamlining, further tailoring of Form PF in order to collect only decision-useful data, and restoring Form PF to its core purpose of supporting systemic risk oversight. The proposing release contains numerous specific requests for comment, signaling the Commissions' willingness to consider advisers' feedback on the regulatory burdens associated with Form PF and potential alternative approaches.

From a practical standpoint, advisers that would no longer be required to file due to being below the $1 billion threshold should review the conditions of any SEC or CFTC relief they rely on to determine whether no longer filing Form PF would affect such relief.

For example, CFTC No-Action Letter 26-06 (amending CFTC No-Action Letter 25-50), which functionally reinstates the registration exemption for funds that offer participations only to qualified eligible persons, conditions relief from CPO and CTA registration requirements on, among other things, filing a Form PF that is received by the SEC and CFTC. [10] Due to the "final filing" requirement for advisers that are no longer required to file Form PF, as described in General Instruction 9 within the form, we understand voluntarily filing Form PF to be prohibited.

Lastly, we note that the Proposed Amendments are also in line with other recent actions by the Commissions to harmonize regulatory requirements for dual-registered entities. [11]

COMMENT PERIOD

Comments must be received on or before June 23, 2026.

We expect comments may focus on the following areas, among others: agreement/disagreement with the proposed raised reporting thresholds, extending the mandatory notification period for current reports beyond 72 hours, further clarifying the definition of an "operations event," narrowing the definition of "hedge fund" to address deemed hedge funds, defining digital assets, the utility of certain counterparty exposure reporting, private credit reporting, and operational and implementation challenges, particularly in light of the October 1, 2026 compliance date for the 2024 Amendments.

We also anticipate comment on the impact of the CFTC No-Action Letter 26-06 relief for advisers that would no longer be required to file Form PF.

HOW WE CAN HELP

If you have questions about how the Proposed Amendments may affect your firm or if you are interested in submitting a comment letter, please contact the authors of this LawFlash.

CONTACTS

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following:

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[1] Form PF; Reporting Requirements for All Filers, Release No. IA-6959 (Apr. 20, 2026), [91 FR 22232 (Apr. 24, 2026)]. *See also* Press Release, Securities and Exchange Commission SEC and CFTC Jointly Propose Amendments to Reduce Private Fund Reporting Burdens (Apr. 20, 2026).

[2] Currently, only SEC-registered advisers with $150 million or more in private fund assets under management are required to file Form PF.

[3] Money Market Fund Reform; Amendments to Form PF, Release No. IA-3879 (July 23, 2014), [79 FR 47736 (Aug. 14, 2014)].

[4] Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting, Release No. IA-6297 (May 3, 2023), [88 FR 38146 (June 12, 2023)]. See our prior coverage of the May 2023 amendments in our May 2023 Report.

[5] Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N–CSR and Form N–1A, Release No. IA-6344 (July 12, 2023), [88 FR 51404 (Aug. 3, 2023)]. See our prior coverage of the July 2023 amendments in our July 2023 LawFlash.

[6] Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, Release No. IA-6546 (Feb. 8, 2024), [89 FR 17984 (Mar. 12, 2024)]. See our prior coverage of the 2024 Amendments in our February 2024 Report.

[7] Among other factors, one of the reasons for the compliance date delay was the mandate issued by the president on January 20, 2025 directing agencies to consider postponing the effective date of any rules that had not yet taken effect. *See, e.g.*, Regulatory Freeze Pending Review (Jan. 20, 2025) [90 FR 8249 (Jan. 28, 2025)]. *See also* Form PF Adopting Release; Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers; Further Extension of Compliance Date, Release No. IA-6919 (Sept. 17, 2025), [90 FR 45131 (Sept. 19, 2025)].

[8] In April 2025, the SEC staff issued FAQs to help advisers work toward compliance with the 2024 Amendments.

[9] Hester M. Peirce, Commissioner, US Securities and Exchange Commission, "PF" Stands for Please Fix: Statement on the Proposed Amendments to Form PF (Apr. 20, 2026). Mark T. Uyeda, Commissioner, US Securities and Exchange Commission, Statement on the Amendments to Form PF (Apr. 20, 2026).

[10] See our prior coverage of CFTC No-Action Letter 25-50 in our January 2026 LawFlash.

[11] See our prior coverage of recent SEC/CTFC harmonization efforts in the following LawFlashes: Crypto Clarity: SEC and CFTC Issue Comprehensive Crypto Asset Guidance – Part 1; Crypto Clarity: CFTC FAQs Clarify Use of Crypto Assets by Registrants and Registered Entities – Part 2; Staff of CFTC and SEC Issue Joint Statement on Certain Crypto Asset Products; Bipartisan Majorities in Two House Committees Vote to Advance the Digital Asset Market CLARITY Act of 2025; US Administration, Congress, and SEC and CFTC Leadership Push for Unified Digital Asset Framework.

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LAWFLASH

DOL PROPOSES RULE ON FIDUCIARY DUTIES FOR SELECTING 401(K) PLAN INVESTMENT OPTIONS

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The US Department of Labor has proposed a rule that could reshape how fiduciaries evaluate 401(k) investment options. Although rooted in an executive order on alternative assets, the proposal addresses more than just alternative assets and outlines a new process-based safe harbor for fiduciary decision-making.

The long-awaited proposed rule from the US Department of Labor (DOL) to implement the August 2025 executive order titled Democratizing Access to Alternative Assets for 401(k) Investors (the Executive Order) was published in the March 31, 2026 edition of the *Federal Register*. The DOL proposal (the Proposed Rule) was issued together with a DOL News Release and Fact Sheet.

The Proposed Rule, which the Executive Order had directed the DOL to issue no later than February 3, 2026, was eagerly anticipated by the retirement industry because of the importance of employer-sponsored 401(k) plans and other participant-directed defined contribution plans (DC plans) covered by the Employee Retirement Income Security Act of 1974, as amended (ERISA), in the retirement landscape. A growing portion of US workers depend primarily or entirely on such plans.

Consequently, asset managers, recordkeepers, insurers, investment advisers, broker-dealers, and other DC plan service providers and product manufacturers are seeking to develop innovative investment solutions for DC plans that include alternative assets. At the same time, industry thought leaders, along with DC plan sponsors and named fiduciaries, are seeking to build investment lineups that enable participants to retire successfully. In short, the entire retirement industry has been looking forward to the Proposed Rule for support and guidance in their efforts to innovate, particularly for DC plan investment options that may invest directly or indirectly in alternative assets.

More specifically, the Executive Order stated that participants in employer-sponsored, participant-directed, ERISA-covered DC plans, such as 401(k) plans, generally do not have the same exposure to alternative assets as do participants in ERISA-covered defined benefit pension plans and governmental retirement plans, and thus do not have access to the investment opportunities offered by alternative assets. The Executive Order defines "alternative assets" to include

- private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies;
- direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate;
- holdings in actively managed investment vehicles that are investing in digital assets;
- direct and indirect investments in commodities;
- direct and indirect interests in projects financing infrastructure development; and
- lifetime income investment strategies, including longevity risk-sharing pools.

As noted above, the Executive Order also directed the DOL to propose regulations or guidance, including safe harbors, that clarify fiduciary duties in connection with investments in alternative assets that are made available as investment options (referred to in the Proposed Rule as "designated investment alternatives") in DC plans. For more information on the Executive Order, please see our prior LawFlash.

The Proposed Rule, however, is broader than what was directed in the Executive Order. Instead, the DOL describes it as an asset-neutral, principles-based regulation that seeks to address the duty of prudence applicable to fiduciaries responsible for selecting all types of plan investment options for ERISA-governed, participant-directed, individual account DC plans, without the DOL "picking winners and losers," not just those investment options that include alternative assets.

While the Proposed Rule's scope is thus explicitly intended to extend to all types of investment options, both traditional and those that include alternative assets, many of the examples the DOL included in the Proposed Rule are more focused on circumstances presented by investments in alternative assets. Also, while many expected the Proposed Rule to be focused on alternative assets, the broader approach is not surprising given the public statements of Assistant Secretary of Labor Daniel Aronowitz about the harmful effects of litigation on fiduciary decision-making in general.

In the preamble to the Proposed Rule, the DOL emphasized that "three key principles form the bedrock of the proposed regulation." "First, there is a need to affirm ERISA as a law grounded in process. Second, ERISA gives maximum discretion and flexibility to plan fiduciaries in selecting designated investment alternatives, including the alternative investments described in [the Executive Order]. Third, when ERISA fiduciary decision-making follows a prudent process—such as the process reflected in the proposed regulations—arbiters of disputes should defer to fiduciaries under a presumption of prudence."

This LawFlash summarizes key provisions of the Proposed Rule addressing the ERISA fiduciary duty of prudence. We will provide additional analysis of other aspects of the Proposed Rule in future LawFlashes and related communications.

ALTERNATIVE ASSETS IN DC PLANS

Alternative assets have been used in DC plans for many years. ERISA already allows the use of alternative assets in DC plans. Thus, the Executive Order and the Proposed Rule were not necessary to permit the use of alternative assets in DC plans. Rather, a stated goal of the Proposed Rule is to alleviate regulatory burdens and litigation risk that have kept plan fiduciaries from considering alternative assets or using them more extensively.

The preamble to the Proposed Rule contains a summary of related DOL guidance, including:

- **The Information Letter issued in June 2020** during President Donald Trump's first term, which concluded that a fiduciary does not violate its fiduciary duties under ERISA solely by offering a professionally managed asset allocation fund with a private equity component as a designated investment alternative for a participant-directed DC plan
- **The Biden-era DOL Information Letter**, which in a supplemental statement on private equity took a more cautionary tone toward fiduciaries using private equity as part of DC plan designated investment alternatives unless the plan fiduciary has experience with private equity in defined benefit plans
- **The DOL's rescission of the Biden administration's supplemental statement**, issued shortly after the Executive Order on August 11, 2025, explaining that the statement deviated from the DOL's historically neutral, principles-based approach

THE PROPOSED RULE'S INTERPRETATIONS OF ERISA'S DUTY OF PRUDENCE

The Proposed Rule addresses the duty of prudence under Section 404(a)(1)(B) of ERISA, which provides that a fiduciary must discharge its duties to a plan with the "care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

Courts have interpreted the duty of prudence as procedural in nature—that is, the duty to follow a prudent process or, stated differently, to exercise procedural prudence. The preamble states that the Proposed Rule is intended to "affirm ERISA as a law grounded in process" and to give deference to fiduciaries when decision-making follows a prudent process. In support, the preamble provides an analysis of the case law and prior DOL guidance on the ERISA duty of prudence.

In particular, the preamble discusses a 1979 DOL regulation (the Investment Duties Regulation), which provides that the duty of prudence is satisfied when a plan fiduciary meets two conditions. First, the fiduciary must give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment. . . ," and then the fiduciary must have "acted accordingly." In the preamble to the Proposed Rule, the DOL explains that the Proposed Rule is meant to supplement and expand the Investment Duties Regulation by identifying six "safe harbor" factors (discussed below) and by demonstrating what it means to "act accordingly" and therefore be prudent.

The Proposed Rule, which would be codified under ERISA's standard of care provision (29 CFR Section 2550.404a-6), elaborates on the duty of prudence and the 1979 Investment Duties Regulation as follows:

- The selection of designated investment alternatives is a fiduciary act governed by the duty of prudence.
- Fiduciaries have "maximum discretion" to select designated investment alternatives to further the purpose of the plan, and the duty of prudence does not restrict or require any specific type of designated investment alternatives. Thus, ERISA does not per se restrict or exclude plan investment options that invest in alternative assets generally or any specific type of alternative assets, as long as such investments are not "otherwise illegal." An "otherwise illegal" investment would include, for example, investments in a foreign adversary in violation of applicable law, such as the Trading With the Enemy Act, or with persons or entities appearing on the Specially Designated Nationals and Blocked Persons List administered by the Office of Foreign Assets Control.
- Fiduciaries have a duty to act prudently when establishing plan investment menus that enable participants to maximize risk-adjusted return.

- The duty of prudence requires fiduciaries to follow a prudent process to give appropriate consideration, including through the use of third-party investment advice fiduciaries, to those facts and circumstances that the fiduciary knows or should know are relevant to the specific designated investment alternative. The Proposed Rule reminds fiduciaries, however, that satisfying the duty of prudence does not excuse a fiduciary from also complying with its additional obligations under ERISA, including the duty of loyalty and ERISA's prohibited transaction rules.

Thus, in the Fact Sheet accompanying the Proposed Rule, the DOL explained:

> Although [the Executive Order] focused on fiduciary responsibilities for offering an asset allocation fund that includes investment in alternative assets, [the Proposed Rule] would apply to the selection of any type of investment as a designated investment alternative, including investments in alternative assets (as defined in [the Executive Order]). This approach recognizes that a fiduciary's responsibilities when selecting asset allocation funds are the same as those that apply when selecting any other type of investment. It also reflects key principles behind this proposal: prudence under ERISA is based on process and gives maximum discretion and flexibility to plan fiduciaries in selecting any types of investment as a designated investment alternative.

The Fact Sheet also clarified that nothing in the Proposed Rule "disturbs the 1979 Investment Duties Regulation."

While the Proposed Rule has a broad scope, there are some aspects of fiduciary duties with respect to investment line-ups that the Proposed Rule does not address. First, the Proposed Rule addresses the duty of prudence in *selecting* designated investment alternatives in participant-directed DC plans. As the preamble notes, the DOL decided against including safe harbors for *monitoring* designated investment alternatives after the initial selection and instead plans to later issue interpretative guidance on fiduciary duties for monitoring designated investment alternatives. This may represent a potential limitation on the scope of the safe harbor, given that breach of fiduciary duty litigation often alleges a failure to appropriately monitor existing designated investment alternatives.

The DOL further notes that the duty of prudence applies not only to the selection of specific designated investment alternatives but also to the larger investment line-up so participants with different risk capacities can maximize their returns for a given level of risk. Yet the DOL views it beyond the scope of the Proposed Rule to address the question of "how to prudently curate a menu of investments overall." The DOL solicited comments on whether future guidance should address the question of what process is required to curate a prudent menu of investments overall, querying whether implementing Section 404(c) of ERISA continues to be "best practice."

THE SAFE HARBOR

The heart of the Proposed Rule is section (f), titled Safe Harbor, which provides a "process based" "non-exhaustive list of factors, when applicable, that a plan fiduciary . . . must objectively, thoroughly and analytically consider, and make determinations on" when selecting designated investment alternatives. If a plan fiduciary follows the process set out for each factor in the Proposed Rule, which may include relying on the recommendation of a fiduciary investment adviser or an investment manager for one or more of the factors, "the plan fiduciary's judgment with respect to the particular factor or factors, including the relationship between the factors, is presumed to have met the duties under Section 404(a)(1)(B) of ERISA of such fiduciary and is entitled to significant deference."

The six Safe Harbor factors are (1) Performance, (2) Fees, (3) Liquidity, (4) Valuation, (5) Performance Benchmark; and (6) Complexity. Each of these six factors is illustrated through numerous examples, twenty in all, that address specific factual circumstances to assist plan fiduciaries in applying each particular factor in the Proposed Rule to the specific facts and circumstances. The Proposed Rule then provides a conclusion as to what actions set out in each example would satisfy (or, in some instances, fail to satisfy) the fiduciary's duties under each factor.

Below we summarize the Proposed Rule's six factors. The 20 detailed examples are beyond the scope of this LawFlash; we aim to address them in future LawFlashes and related communications.

Performance

This factor requires a fiduciary to appropriately consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns, over an appropriate time horizon, of the designated investment alternative (net of fees and expenses) furthers the purpose of the plan by enabling participants and beneficiaries to maximize risk-adjusted returns on the investment (net of fees and expenses).

Fees

This factor requires a fiduciary to consider a reasonable number of similar alternatives and determine that the fees and expenses of the designated investment alternative are "appropriate, taking into account its risk-adjusted expected return and any other value the designated investment alternative brings to furthering the purpose of the plan." Other "value" is defined to include any benefits, features, or services other than risk-adjusted returns. The Proposed Rule also provides that the duty of prudence, and this section of the Proposed Rule, are not violated simply because the plan fiduciary does not select the lowest fee and expense option from the alternatives considered.

Liquidity

This factor requires a fiduciary to appropriately consider and determine that the designated investment alternative will have sufficient liquidity to meet the anticipated needs of the plan at both a plan level and individual participant level.

Liquidity can present challenges for alternative assets used in DC plans because some alternative assets have longer time horizons and less liquidity than DC plans, which in the ordinary course commonly allow daily movement in and out of the plan's investment options, may require. Even so, this factor was intended to clarify that there is no requirement that a fiduciary select only fully liquid products—the risk-adjusted return of less liquid investments may warrant offering investment options that include illiquid alternative investments, sacrificing some liquidity for additional risk-adjusted return.

Valuation

This factor requires the fiduciary to appropriately consider and determine that the designated investment alternative has adopted adequate measures to ensure that it is capable of being timely and accurately valued in accordance with the needs of the plan. Like liquidity, valuation can also present challenges for alternative assets

in DC plans because alternative assets may not be daily traded on a public exchange, depending on the specific type of alternative asset and how it is structured.

Performance Benchmark

This factor requires the plan fiduciary to appropriately consider and determine that each designated investment alternative has a meaningful benchmark and then compare the risk-adjusted expected returns of the designated investment alternative to the meaningful benchmark. For this purpose, a "meaningful benchmark" is defined as an "investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative."

The Proposed Rule includes in this factor that "there is no presumption or preference against new or innovative designated investment alternative designs." This appears to be intended to address the challenges of finding benchmarks for new or innovative investment strategies or products for which there may not be pre-existing mandates, strategies, or objectives that are entirely similar. In that case, the Proposed Rule says fiduciaries should "seek to identify the best possible comparators" while also scrutinizing the potential value proposition presented by the new or innovative design.

This factor may be of additional interest since the US Supreme Court has granted certiorari to hear a case in the 2026 October Term addressing how the failure of a plaintiff to base its allegations on "meaningful benchmarks" should be treated at the pleadings stage of breach of fiduciary duty litigation.

Complexity

The final factor requires a plan fiduciary to "appropriately consider the complexity of the designated investment alternative" and to determine that the plan fiduciary has the "skills, knowledge, experience, and capacity to comprehend" the designed investment alternative sufficiently to discharge its obligations under ERISA and the governing plan documents and to determine if it needs to seek assistance from a qualified investment advice fiduciary, an investment manager, or other individual.

This appears to be a factor intended to account for, among other things, the additional considerations raised by certain types of alternative investments. For this reason, the complexity of a particular investment option may warrant some plan fiduciaries using an outside adviser with specialized expertise for the given investment alternatives.

LOOKING AHEAD, QUESTIONS, AND NEXT STEPS

Comments are due on June 1, 2026. We expect there may be extensive comments given the scope of the Rule extending beyond alternative assets and the degree of detail and specificity in the Proposed Rule.

For example, beyond plan fiduciaries who are directly impacted by the Rule, the Rule will also impact many other stakeholders in the DC Plan ecosystem, including plan consultants, investment advisers, fund sponsors/managers, asset managers, recordkeepers, insurers, investment advisers, broker-dealers, and other DC plan service providers and product manufacturers. We expect that many of these market participants will find issues to surface through the comment process.

Please stay tuned for our further analysis of these Proposed Rules, including on the examples and additional points we see raised by the proposal. As the Proposal raises many questions arising primarily under areas of law or guidance outside of ERISA, particularly the federal securities laws, US Securities and Exchange Commission rules, and accounting standards, we will be coordinating closely with our investment management practice, ERISA litigators, and others to provide more in-depth insights that cut across these different areas of law integral to the DC Plan market. We also welcome your questions and comments on our initial impressions on the Proposed Rule.

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